TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923.

No. 565

CHARLES D. NEWTON, AS ATTORNEY GENERAL OF THE STATE OF NEW YORK; EDWARD SWANN, AS DISTRICT ATTORNEY OF THE COUNTY OF NEW YORK, ET AL., APPELLANTS,

vs.

CONSOLIDATED GAS COMPANY OF NEW YORK

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

FILED SEPTEMBER 22, 1923

(29,875)

(28,875)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 3, 1924

[fol. 1] **DISTRICT COURT OF THE UNITED STATES,**
SOUTHERN DISTRICT OF NEW YORK

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant,

against

CHARLES D. NEWTON, as Attorney-General of the State of New York; Edward Swann, as District Attorney of the County of New York, State of New York, and Lewis Nixon, Constituting the Public Service Commission for the State of New York, First District, Defendants

NOTICE RE COSTS

Take notice, that the within is a copy of the items of the costs and disbursements of the complainant, Consolidated Gas Company of New York, in the above entitled action, and that the same will be taxed by the Clerk of this Court at his office, Post Office Building, Borough of Manhattan, City of New York, on April 26th, 1922, at eleven o'clock in the forenoon.

Dated, New York, April 24th 1922.

Yours, etc., Shearman & Sterling, Solicitors for Complainant, 55 Wall Street, New York City.

To Wilber W. Chambers, Esq., Solicitor for defendant Newton, 51 Chamber Street, New York City; John P. O'Brien, Esq., Corporation Counsel, Solicitor for defendant Swann, Municipal Building; Ledyard P. Hale, Esq., Solicitor for defendants The Public Service Commission, Albany, New York.

[fol. 2] DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

BILL FOR COSTS AND DISBURSEMENTS OF CONSOLIDATED GAS COMPANY OF NEW YORK—Filed Nov. 27, 1922

Costs

Attorney's docket fees.....	20.00	
63 Exceptions to Master's report overruled at $5 each.....	215 [315]*.00	Plaintiff asks that item be increased to 137 exceptions at $5.00 each: total $685.00. Defts. object to rasing item; objn. overruled; exception.
Attorney's docket fee in United States Supreme Court as per mandate case No. 257.....	20.00	
Costs and Attorney's docket fee in United States Supreme Court as per mandate case No. 258.....	362.40	
	[717.40]*	617.40

Deft. objects to allowance of any costs for exceptions—overruled on ground that court did not allow same. Obj. overruled. Exception.

Pltff. asks for allowance of 137 exceptions at $5.00 each. Clerk allows 43 exceptions to Master's Report at $5.00 each and overrules allowance of any costs for exceptions to Master's Opinion. Both sides except.

Disbursements

Printing:

"Complainant's memorandum discussing several points referred to upon the oral argument" used before the Master	3,284.41	Objected to; obj. sust'd; except'n.
Memorandum submited by Complainant in support of its motion for final decree before Hon. Learned Hand	2,024.53	
Reply memorandum for Complainant before Hon. Learned Hand.....	2,735.22	
Printing of Index to Record.....	2,146.45	
Memorandum opposing motion to advance before United States Supreme Court.....	25.30	

[*Figures enclosed in brackets erased in copy.]

[fol. 3]

Motion to consolidate and reassign appeals before United States Supreme Court	44.45	Objected to; obj. sust'd; except'n; confirmed by Judge L. Hand.	
General brief for Appellee on appeal before United States Supreme Court	428.13		
Appellee's brief on the facts and incidental questions of law before United States Supreme Court	10,130.35		
Subject index for above brief	263.80		
Appellant's brief before United States Supreme Court	81.80		
	[$21,164.44]*		[$21,164.44]*
Stenographer's fees for testimony:			
Copy of record for use of and furnished to the Master, [47,760]* folios at [40c]* [30c]* per folio	31,024 [19,104.00]*		[104.00]* 204.80
Reduced by Judge L. Hand to 25c per folio, total $7,756.00, by order Nov. 27, 1922.			
Further reduced by Judge L. Hand's order of May 1, 1923, to 20 cents per folio, total $6,204.80.			
See objections next page and first ruling.			
Compensation and expenses of special masters:			
Abraham S. Gilbert:			
Fees	28,750.00 [57,500.00]*	So reduced by Supreme Court.	
Expenses	655.38		
As per order of Hon. Julius M. Mayer, dated December 13, 1921.			
Richard Welling:			
Fees	15,000.00		
Expenses	2,330.06		
As per order of Hon. Learned Hand, dated March 15, 1922.			
	[75,485.44]*		46,735.44 [75,485.44]*

[*Figures enclosed in brackets erased in copy.]

Witnesses' fees:

Name	Days	Fee	Mileage		
J. Quinn.....	1	$1.50	$10.00		
W. B. Hogan.....	1	1.50	1.10		
O. C. Naumen....	1	1.50	.70		
Chief Deputy Commissioner Taxes & Assessments..	1	1.50	.....		
James P. Donahue	1	1.50	1.70		
Joseph N. Foley..	1	1.50	1.00		
			2.00		
John F. Tracey...	1	1.50	[10.00]* Reduced by Agreement.		
		$10.50	[$24.50]*	[35.00]*	[35.]*
			16.50	27.00	27.

[fols. 4 & 5]

Paid for surety bonds:

Premiums on bonds filed with Special Master Richard Welling in lieu of the deposit of impounded funds with him.....	$76,086.00	$76,086.00
Whole item objected to on grounds set forth in Donnelly affidavit verified May 8, 1922, and as excessive on ground that bonds were given as result of application made to the Court by pltff. on Aug. 9, 1920. Charge of more than ½ of 1% premium objected to. Obj'n overruled. Except'n.		
Paid to clerk of the United States District Court:		136.70
[Deposit]* Clerk's Fees.....	[15.00]*	[15.]*
Total Bill of Costs.....		$192.607.28
Amount paid by complainant at the rate of one half of one per cent for the use of Liberty Bonds borrowed and deposited with the special master in lieu of cash or surety bond....		$28,094.63

Disallowed by Judge L. Hand by order of May 1, 1923.

Item of $12,040.40 stenographer's fees objected to on ground that plaintiff produced stenographer's bills which show no charge for original but a charge of $4.50 a page for approximately 20 copies. Defendants produced stenographer's bills which showed a charge of 30 cents a page for 2 copies and original for court and master at 30 cents per page—1/3 of charge reduced by stenographer to 15 cents per page 1/3 charge. Each of the three defendants were charged at this rate. All bills were based on mimeographed pages—not folios.

[*Word and figures enclosed in brackets erased in copy.]

Item reduced to 32,601 folios at 30 cents per folio $9,780.30. Exception.

Taxed and total costs allowed Plaintiff.....	$129,807.34
Credit:	
Credit to defendants for costs of appeal from the order fixing the Master's allowances as provided in the mandate of the U. S. Supreme Court per Judge L. Hand's order May 1, 1923.	$113.37
Net Amount taxed in favor of plaintiff....	$129,693.97

July 25, 1923.

Alex. Gilchrist, Jr., Clerk.

Jurat showing the foregoing was duly sworn to by Charles A. Vilas omitted in printing.

[fol. 6] DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

NOTICE RE COSTS

Take notice, that a bill of costs of which the within is a copy will be presented to Honorable Learned Hand for retaxation, at his Chambers in the Woolworth Building, Borough of Manhattan, New York City, on the 22nd day of November, 1922, at 5 o'clock, P. M.

Dated, New York, November 15, 1922.

Yours, etc., Shearman & Sterling, Solicitors for Complainant, 55 Wall Street, New York City.

To Wilber W. Chambers, Esq., Solicitor for defendant Newton, 51 Chambers Street, New York City; John P. O'Brien, Esq., Corporation Counsel, Solicitor for defendant Swann, Municipal Building; Ledyard P. Hale, Esq., Solicitor for defendants The Public Service Commission, 30 Church Street, New York City.

[fol. 7] DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

NOTICE RE COSTS

Take notice, that the within is a copy of the items of the costs and disbursements of the complainant, Consolidated Gas Company of New York, in the above entitled action, and that the same will be

taxed by the Clerk of this Court at his office, Post Office Building, Borough of Manhattan, City of New York, on April 26, 1922, at eleven o'clock in the forenoon.

Dated, New York, April 24, 1922.

Yours, etc., Shearman & Sterling, Solicitors for Complainant, 55 Wall Street, New York City.

To Wilber W. Chambers, Esq., Solicitor for defendant Newton, 51 Chambers Street, New York City; John P. O'Brien, Esq., Corporation Counsel, Solicitor for defendant Swann, Municipal Building; Ledyard P. Hale, Esq., Solicitor for defendants The Public Service Commission, Albany, New York.

[fol. 8] DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

BILL FOR COSTS AND DISBURSEMENTS OF CONSOLIDATED GAS COMPANY OF NEW YORK—Filed May 16, 1923

Costs

Attorneys' docket fees.....	$20.00	Plaintiff asks that item be increased to 137 exceptions at $5.00 each, total $685.
63 Exceptions to Master's report overruled at $5 each.....	315.00	Defendants object to raising item. Objection overruled—exception.
Attorneys' docket fee in United States Supreme Court as per mandate case No. 257.....	20.00	Defendants object to allowance of any costs for exceptions overruled on ground that Court did not allow same. Objections overruled; except.
Costs and Attorneys' docket fee in United States Supreme Court as per mandate case No. 258.....	362.40	Plaintiff asks for allowance of 37 Exceptions at $5.00 each. Clerk allows 43 exceptions to Master's report at $5.00 each & overruled allowance of any costs for Exceptions to Master's Opinion. Both sides except.

[fol. 9]

Disbursements

Printing:

"Complainant's memorandum discussing several points referred to upon the oral argument" used before the Master	$3,284.41		
Memorandum submitted by Complainant in support of its motion for final decree before Hon. Learned Hand	2,024.53		
Reply memorandum for Complainant before Hon. Learned Hand	2,735.22		
Printing of Index to Record	2,146.45		
Memorandum opposing motion to advance before United States Supreme Court	25.30	Objected to; objection sustained; exceptn.	
Motion to consolidate and reassign appeals before United States Supreme Court	44.45		
General brief for Appellee on appeal before United States Supreme Court	428.13		
Appellee's brief on the facts and incidental questions of law before United States Supreme Court	10,130.35		
Subject index for above brief	263.80		
Appellant's brief before United States Supreme Court	81.80		
	$21,164.44		$21,164.44

Off $21,164.44.

Stenographer's fees for testimony:

Copy of record for use of and furnished to the Master [32,601]* [47,760]* folios at [40c]* 30c per folio, Reduced by Clerk to 30c	[9,780.30]* [19,104.30]*		7,756.00 [9,307.20]* [9,780.30]* [19,104.30]*

Reduced by Judge Hand to 25 cents per folio—total, $7,756.00.
See objn. & exception at end.

Compensation and expenses of special masters:

Abraham S. Gilbert:	28,750.		
Fees	[57,500.00]*	As reduced by Supreme Court. Objected to on ground that appeal pending on Gilbert and about to be taken on Welling. Objection overruled. Exception.	
Expenses	655.38		

As per order of Hon. Julius M. Mayer, dated December 13, 1921.

[*Figures enclosed in brackets erased in copy.]

[fols. 10 & 11]

Richard Welling:			
Fees		15,000.00	
Expenses		2,330.06	
			46,735.44
		[75,485.44]*	$[75,485.44]*

As per order of Hon. Learned Hand, dated March 18, 1922.

Witnesses fees:

Name	Days	Fee	Mileage			
J. Quinn	1	$1.50	$10.00			
W. B. Hogan	1	1.50	1.10			
C. C. Naumon	1	1.50	.70			
Chief Deputy Commissioner, Taxes & Assessments	1	1.50	.....			
James P. Donahue	1	1.50	1.70			
Joseph N. Foley	1	1.50	1.00			
			2.00		Reduced by agreement.	
John F. Tracey	1	1.50	[10.00]*			
		$10.50	[$24.50]*	[35.00]*		[35.00]*
			16.50	27.00		27.00

Paid for surety bonds:

Premiums on bonds filed with Special Master Richard Welling in lieu of the deposit of impounded funds with him	$76,086.00	$76,086.00

Whole item objected to on grounds set forth in Donnelly affidavit verified May 8, 1922, and as excessive and on ground that bonds were given as result of Appeal made to the Court by Pltff. on August 9, 1920—charge of more than ½ of —% Premium objected to; objection overruled; exception.

Paid to Clerk of the United States District Court:

Deposit	[16.00]*	[16.00]*
Total Bill of Costs		$192,607.28

Stenographers fees:

9,307.20

Items of $[12,640.40]* objected to on ground that plaintiff produced stenographers bills, which show no charge for original, but a charge of $4.50 a page for approximately 20 copies. Defendants produced stenographers bills which showed a charge of 30c a page for 2 copies and original for court and master at 30c per page—1/3

[*Figures enclosed in brackets erased in copy.]

of charge reduced by stenographer to 15c per page 1/3 charge. Each of the three defendants were charge- at this rate. All bills were based on mimeographed pages—not folios. See affidavits of J. A. Donnelly and Harry Hertzhoff.

31,024	9,307.20
Item reduced to 32,601 folios at 30c per folio..	$[9,780.30]*

Jurat showing the foregoing was duly sworn to by Charles A. Vilas omitted in printing.

[fol. 12] DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT IN OPPOSITION—Filed Nov. 27, 1922

STATE OF NEW YORK,
City & County of New York, ss:

James A. Donnelly, being duly sworn, deposes and says:

I am a solicitor of this court, and Assistant Corporation Counsel of the City of New York, associated with the solicitor for the above named defendant, Edward Swann, and am familiar with the proceedings herein.

I have carefully examined the proposed bill of costs and disbursements of complainant in this matter and I depose and say:

1. As to the first item "Attorneys' docket fees, $20.00"—I find that such docket fees are included in the fourth item shown on the bill of costs designated as "Costs and attorneys' docket fee in the United States Supreme Court as per mandate case No. 258, $362.40." I attach hereto copy of a letter under date of March 14, 1922, from the clerk of the United States Supreme Court to Hon. Wilber W. Chambers, Deputy Attorney-General, in which the clerk states that the mandate of the court directs the District Court to issue execution for the costs of the appellant in this court in the amount of [fol. 13] $342.40 and the taxed attorneys' fee of $20, a total of $362.40. Thus, it conclusively appears that the attorneys' docket fees are included in the sum of $362.40 named in the mandate.

2. As to the second item on the bill of costs and disbursements designated as "63 exceptions to master's report overruled at $5 each, $315.00"—I find upon careful examination of the record that there were 62 exceptions taken to the master's report and filed by the defendants herein, and not 63 as alleged by complainant. By the amended decree entered herein on August 11th, 1920, the following exceptions were overruled:

1. To Finding marked "1."
2. " " " "3."
3. " " " "4."
5. " " " "6."
6. " " " "7."
7. " " " "8."
8. " " " "9."
9. " " " "10."
10. " " " "11."
11. " " " "13."
12. " " " "16."
13. " " " "17."
15. " " " "19."
16. " " " "20."
17. " " " "21."
18. " " " "22."
22. " " " "28."
26. " " " "33."
34. " " " "43"
36. " " " "45."
37. " " " "46."

[fol. 14]

39. To Finding marked "50."
41. " " " "52."
54. " " " "67."
55. " " " "68."
58. " " " "71."
62. " " " "77."

The following exceptions were modified:

4. To Finding marked "5."
14. " " " "18."
51. " " " "62."

All the other exceptions to the report of the master are sustained.

In the amended decree of August 11, 1920, Judge Learned Hand also overruled the exceptions to the following numbered findings of the master:

Two, fourteen, fifteen, twenty-five, twenty-six, twenty-nine, forty, forty-one, forty-eight, fifty-three, sixty-six, seventy-five and seventy-six, and modified the exception to the finding marked fifty-three.

There were no exceptions to the last mentioned findings by the defendants.

At the time that the exceptions to the report of the special master were overruled by Hon. Learned Hand, he did not impose costs, amounting to $5 for each exception so overruled, though in my opinion such was discretionary with him. Failure on the part of Hon. Learned Hand to impose such discretionary costs upon the defendants herein, I think, justifies the exclusion of this item in the bill of costs.

3. As to the first item under "Disbursements, printing," Complainant's memorandum discussing several points referred to upon [fol. 15] the oral argument used before the master, $3,284.41"—This memorandum consists of 193 pages, was a gratuitous effort on the part of complainant to place certain favored facts before the special master; throughout the trial the said special master frequently stated that he would not accept any briefs from any of the parties. Statements made by the special master clearly showing that he did not desire briefs submitted to him will be found on pages 15917, etc. of the record. Furthermore, such printed memorandum is not required by any of the rules of this court. These facts justify the disallowance of such item. The amount of this item clearly shows that these disbursements covers the printing of a great number of memoranda, far more than were really necessary for submission to the special master.

4. As to the second item under "Disbursements, printing," "Memorandum submitted by complainant in support of its motion for final decree before Hon. Learned Hand, $2,024.53"—this memorandum consists of 255 pages and is not a taxable item under any rule of this court. Furthermore, the item is grossly excessive and covers the cost of printing many copies of this memorandum, more than was necessary for submission to the court.

5. As to the third item under "Disbursements, printing," "Reply memorandum for complainant before Hon. Learned Hand, $2,735.22"—this memorandum consists of 236 pages, and it is not taxable under the rules of this court. Furthermore, the item is grossly excessive and covers the cost of printing many copies of this memorandum, more than were really necessary for submission to the court.

6. As to the fourth item under "Disbursements, printing," "Printing of index to record, $2,146.45."—it appears that the defendants [fol.16] were the appellants in the United States Supreme Court and prepared a proper and sufficient index to the record, which was printed with the other papers on the appeal, and that the index to the record referred to herein was a gratuitous effort on the part of complainant and was superfluous. Complainant has resisted every effort made by the defendants to procure a copy of this index to the record, and has always insisted that such index was the personal property of complainant and defendants have never been able to procure a copy of such index. I am unable to state the extent of its use by any court, for I am not aware it was ever submitted to any court, but kept always in the possession of the complainant. Such index is not taxable under the rules of this court or of the United States Supreme Court. The clerk of the United States Supreme Court has taxed all proper disbursements allowable in that court and included them in the mandate herein.

7. As to the fifth item under "Disbursements, printing," "Memorandum opposing motion to advance before United States Supreme Court, $25.30"—it appears that in the final decree made by Judge

Hand on August 11, 1920, the defendants were in duty bound to perfect and prosecute the appeal promptly and without delay, and in accordance with that provision the defendants did bring on such appeal and moved to advance the hearing of such appeal in accordance with the letter of the decree. The item charged herein against the defendants relates to a memorandum opposing the defendant's motion to advance the appeal and was therefore in violation of the decree rendered by Judge Hand, compelling the defendants to move to advance the appeal for an early hearing; moreover, it was in the United States Supreme Court and no such item is taxable in that court.

8. As to the sixth item under "Disbursements, printing," "Motion to consolidate and reassign appeals before United States Supreme [fol. 17] Court, $44.45"—it appears that this motion was necessary because appellee was not ready to argue when the case was reached in October, 1921. It was a motion made for its own benefit and no costs were allowed by the United States Supreme Court, on the motion. There is no rule in this court permitting the taxation of such an item as a disbursement.

9. As to the seventh item under "Disbursements, printing," "General brief for appellee on appeal before United States Supreme Court, $428.13"—this brief consists of 60 pages. No such costs were allowed by the clerk of the United States Supreme Court, and as a matter of fact such disbursements are not taxable. Moreover, the bill of costs does not show how many copies were printed nor how many pages the brief contained.

10. As to the eighth item under "Disbursements, printing," "Appellee's brief on the facts and incidental questions of law before the United States Supreme Court, $10,130.35"—it appears that this brief consists of 495 pages, and that as stated by Charles A. Vilas, Counsel for Complainant, numerous copies thereof were distributed by him. No such costs or disbursements are allowable under any rule of the United States Supreme Court, but, on the contrary, the decision of the case of Ex Parte Hughes, 114 U. S. 548, expressly holds that such disbursements are not taxable.

11. As to the ninth item under "Disbursements, printing," "Subject index for above case, $263.80"—it appears that this index consists of 27 pages. This index was an innovation in the United States Supreme Court, was not required by any rule, and is not taxable under any rule of this court; inasmuch as the brief is not a taxable item surely an index to a brief would not be a taxable item.

[fol. 18] 12. As to the tenth item under "Disbursements, printing" "Appellant's brief before the United States Supreme Court, $81.80"—this brief consists of 20 pages. It is not a taxable item under any rule of this court or of the United States Supreme Court. Furthermore, the item on its face appears excessive and is the cost of printing a large number of copies of this brief, far more than necessary for submission to the court.

13. As to the item under "Stenographer's fees for testimony", "Copy of record for use of and furnished to the master, 47,760 folios at 40¢ per folio $19,104"—it appears that the charge per folio is excessive, more than the legal rate per folio. Furthermore, the defendants have paid a portion of the stenographer's fees, as will be more clearly shown by the attached vouchers showing such payment. At page 15475 of the record the master denied receiving a copy of the record.

"Mr. O'Brien: Well it is in the record and you have been getting a copy of the record.

The Master: No, I have not had a copy of the record and I have not read Mr. Little's testimony."

This item would not be taxable in the State courts of the State of New York, and there is no rule of this court allowing such item to be taxed unless pursuant to an agreement between the parties in the action and no such agreement was made or entered into. Furthermore, under Equity Rule 50 the fees of a stenographer "shall be fixed by the court" and taxed ultimately as costs. In the above case the stenographer's fees have not thus far been fixed by the court in accordance with such rule.

14. As to the item under "Compensation and expenses of Special [fol. 19] Masters", "Abraham S. Gilbert, fees, $57,500, expenses, $655.38"—the defendants herein appealed to the United States Supreme Court, and also to the Circuit Court of Appeals, from the order fixing such fees and expenses, upon the ground that such fees are grossly excessive, and that in the fixation of such fees the court abused its discretion. This appeal was Case No. 750 on the October, 1921 Term of the Supreme Court of the United States. The appeal was regularly reached and argued on April 28th, 1922, and the matter submitted to the United States Supreme Court. The decision upon such fees is now pending. For these reasons it is submitted that the amount of such fees should not now be inserted in the bill of costs.

15. As to the item under "Compensation and expenses of Special Master," "Richard Welling, Fees, $15,000, expenses, $2,330.06"—the right to appeal from the fixation of such fees has not yet expired. The defendants are now preparing an appeal from the order of Hon. Learned Hand, dated March 15, 1922, which fixed the amount of the fees and expenses of said Special Master.

16. As to the item "Premium on bonds filed with Special Master Richard Welling in lieu of the deposit of impounded funds with him, $76,986.00"—it appears that the decree made herein by Hon. Learned Hand, dated August 4, 1920, (Rec. p. 187a) provides, among other things, as follows:

"* * * The plaintiff shall, on the fifteenth day of August, 1920, and on the fifteenth day of each succeeding month, pay to Richard Welling, Esq., (who is hereby appointed special master for that purpose), out of all moneys collected by it for sale of gas in the

City of New York the following sums: All sums in excess of eighty cents collected from all consumers other than the City of New York; [fol. 20] all sums in excess of seventy-five cents collected from the City of New York. And it is

Further ordered, adjudged and decreed that the said Special Master shall deposit all moneys so paid to him, equally in accounts in his name as Special Master * * * at such interest as he can best obtain * * *."

After the entry of the above mentioned decree, complainant made a motion to amend this decree asking to be permitted to withdraw the moneys deposited and in lieu thereof to substitute Liberty Bonds, etc., Judge Hand allowed them to do so (Rec. p. 195a). He stated as follows:

"Provisions for Deposit of Moneys Impounded

The plaintiff urges with force, I think, that to impound all the moneys over eighty cents for a period perhaps of a year will cause loss both to itself and to the consumers. It suggests that it have the right to substitute adequate securities. The best that the special master can get on the deposits is probably three and a quarter per cent.; the plaintiff if required to finance its temporary requirements must pay much more, it says fourteen per cent. In any case it will sustain a loss which will profit no one but the banks, so far as appears. I see no advantage in insisting upon impounding the moneys if adequate security can be otherwise provided. I shall therefore modify the decree by allowing the plaintiff to deposit with the master in lieu of cash Liberty Bonds taken at their market value, or any other bonds which are a proper investment by savings banks in New York." (Rec. p. 189)."

Such motion was opposed by the defendants herein, but it was granted and a direction was made by Hon. Learned Hand as above stated.

He further permitted the complainant to file Surety Bonds under certain conditions:

"Also I allow the plaintiff to substitute surety company bonds for cash or to withdraw cash by giving such bonds, on the following conditions: No single company shall give a larger bond than $500,000, or more than one bond. The bond must secure not only the cash for which it is substituted but interest at seven per cent during the period of its existence, which is to be part of the funds."

[fol. 21] Complainant acted pursuant to such permission and deposited with the special master certain surety bonds, and from the date of the amended decree, on or about August 11, 1920, whatever sums in excess of the statutory rates for gas supplied to general consumers and to the City of New York were charged by complainant have been collected by and used by complainant.

Upon the argument complainant claimed that money used in its gas business was entitled to a return of 8%, so that the use of the moneys withdrawn upon deposit with the special master was of great advantage and of great benefit to the complainant, and the

value of such use, I am convinced, is far more than the premiums upon the surety bonds sought to be charged herein as an item of disbursement.

Furthermore, there is no rule of this court allowing any such disbursements as taxable. The bonds referred to herein which were filed with Special Master Welling were not supersedeas or appeal bonds given pursuant to any statute of this court, but were allowed by Hon. Learned Hand as a convenience to complainant so as to permit it to withdraw and use the moneys which the court had previously directed to be impounded.

James A. Donnelly.

Sworn to before me this 8 day of May, 1922. Harry Hertzoff, Commissioner of Deeds, the City of New York.

[fol. 22] EXHIBITS TO AFFIDAVIT

U. S. DISTRICT COURT

Before Special Master Gilbert.

New York, April 12, 1920.

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant,

vs.

CHARLES D. NEWTON, &c., et al., Defendant

The City of New York to Adams & Chambers, Dr.

Notary Public, Stenographers United States District Court, Rooms 823-4 Park Row Building. (Tel., Barclay 8792)

1920.			
March 1-30. To Mimograph copies of proceedings—daily copy:			
1,983 pages at .60 (2 copies)	$1,189.80		
1,191 pages at .30, 1/3 charge taking defendant's proofs—original for Court, Copy for Master.....	357.30	$1,547.10	
Reduced by agreement		178.65	
			1,368.45

Duplicate.
Printed copies to be furnished later without extra charge.

[fol. 23] U. S. District Court

Before Special Master Gilbert.

New York, January 31, 1920.

Consolidated Gas Company of New York, Complainant,

vs.

Charles D. Newton, &c. et al., Defendants

The City of New York to Adams & Chambers, Dr.

Notary Public, Stenographers United States District Court, Rooms 823-4 Park Row Building. (Tel., Barclay 8792)

1920.

Jan. 5-30.	To Mimograph copies of proceedings, daily copy:		
	3,470 pages at .60 (2 copies)	2,082.00	
	3,414 pages at .30 1/3 charge taking defendant's proofs, Original for Court, Copy for Master	1,024.20	$3,106.20
	Reduced by agreement		512.10
			$2,594.10

Duplicate.
Printed copies to be furnished later without extra charge.

[fol. 24] UNITED STATES DISTRICT COURT

Before Special Master Gilbert.

New York, February 28, 1920.

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant,

vs.

CHARLES D. NEWTON, &c., et al., Defendants

The City of New York to Adams & Chambers, Dr.

Notary- Public, Stenographers United States District Court, Rooms 823-4 Park Row Building. (Tel., Barclay 8792)

1920.			
Feb. 9-27.	To Mimeograph copies of proceedings—daily copy:		
	3,586 pages at .60 (2 copies).....	$2,151.60	
	3,037 pages at .30, 1/3 charge taking defendant's proofs, original for Court, Copy for Master.....	911.10	$3,062.70
	Reduced by Agreement		455.55
			$2,607.15

Duplicate.
Printed copies to be furnished later without extra charge.

[fol. 25] Supreme Court of the United States

Office of the Clerk

Washington, D. C., March 14, 1922.

Hon. Wilber W. Chambers, Deputy Attorney-General, New York City.

DEAR SIR: The mandate of this court in the case of Consolidated Gas Company of New York v. Newton, Attorney-General, etc., et al., No. 258, October Term, 1921, having been issued today, pursuant to the court's order, the same has been handed to Mr. Charles A. Vilas, of the firm of Shearman & Sterling, New York City. The decree of this court modified and affirmed the decrees of the District Court, with costs to be paid by the appellees. The mandate of this court, therefore, directs the District Court to issue execution against your clients for the costs of the appellants in this court, $342.40, and the taxed attorney fee of $20.00, a total of $362.40.

Herewith I hand you bill for costs of the appellees, amounting to $13.20, to which I ask your attention. This is in addition to the amount included in the mandate, and should be paid here.

Yours truly, William R. Stansbury, Clerk, By H. S. Ass't. TFD.

[fol. 26] Supreme Court of the United States

Office of the Clerk

Washington, D. C., March 14, 1922.

Hon Wilber W. Chambers, Deputy Attorney-General, New York City.

Dear Sir: The court having this day granted a motion that the mandate of this court issue at once in the case of Newton, Attorney-General, et al. v. Consolidated Gas Company of New York, No. 257, October Term 1921, wherein the decrees of the District Court were affirmed with costs on March 6th, last, the mandate, therefore, has been delivered this day to Mr. Charles A. Vilas, of the firm of Shearman & Sterling, New York City. It directs the District Court to issue execution against your clients for the sum of $20.00, attorney's docket fees in the case, which sum should be paid in that court.

Herewith I hand you bill for costs incurred in this court, amounting to $49.95. Crediting the deposit of $25.00 heretofore made by you, leaves balance due of $24.95 to which I beg to ask your attention. This amount should be paid here.

Yours truly, William R. Stansbury, Clerk, By H. S., Ass't.

TFD.

[fol. 27] District Court of the United States for the Southern District of New York

[Title omitted]

Defendants' Objections—Filed Nov. 27, 1922

The defendants, Charles D. Newton, as Attorney General of the State of New York, and Edward Swann, as District Attorney of the County of New York, make the following objections to the complainant's proposed bill of costs and disbursements in the above-entitled matter:

(1) Defendants object to the allowance of the item "63 exceptions to the Master's report overruled, at $5 each, $315," for the reasons: (a) There were sixty-two exceptions to the Master's report filed by the defendants and not sixty-three as alleged by the complainant; (b) By the amended decree entered herein on August 11, 1920, Judge Learned Hand made the following disposition of defendants' exceptions. He overruled twenty-seven, modified three and sustained the others. In overruling exceptions filed by the defendants, Judge Learned Hand imposed no costs.

(2) Compensation and expenses of Special Master Abraham S. Gilbert in the sum of $57,500, and expenses, amounting to $655.38. The reason for this objection is that the granting of this allowance

[fol. 28] is now before the United States Supreme Court upon appeal, and the matter has already been argued and a decision pending. We ask that the fixation of costs and disbursements be held until the United States Supreme Court finally disposes of this question.

(3) Defendants object to the disbursements for printing "Complainant's Memorandum, discussing several points referred to upon the oral argument used before the *the* Master," amounting to $3,284.41; also "Memorandum submitted by complainant in support of its motion for final decree before Honorable Learned Hand," amounting to $2,024.53; also "Reply Memorandum for Complainant before Honorable Learned Hand," amounting to $2,735.22, for the reason that there is no rule of this Court which requires the printing of such papers or allows such disbursements.

(4) The defendants object to the disbursement for printing of "Index to Record," amounting to $2,146.45, for the reason that the defendants were the appellants in the United States Supreme Court and a proper and sufficient index to the record was printed with the other papers on appeal, and further, that the index for which the charge is made was superfluous; and if the same were taxable under the rules of the United States Supreme Court, the Clerk has taxed all proper disbursements and included them in the mandate.

(5) The defendants object to the disbursements for printing the "Memorandum Opposing Motion to Advance before the United States Supreme Court," amounting to $25.30; also "Motion to Consolidate and Re-assign Appeals before United States Supreme Court," amounting to $44.45; also "General Brief for Appellee on Appeal before United States Supreme Court," amounting — $428.13; also "Appellee's Brief on the Facts and Incidental Questions of Law before the United States Supreme Court," amounting to $10,130.35; also "Subject Index for above brief," amounting to $263.80; "Appellant's Brief before United States Supreme Court," amounting to [fol. 29] $81.80, for the reason that there is no rule permitting or allowing such disbursements, but, on the contrary, the decision of the United States Supreme Court in the case of ex parte Hughes, 114 U. S. 548, expressly holds that such disbursements are not taxable.

(6) Defendants object to the item under "stenographer's fees for testimony," "Copy of record for use of and furnished to the master, 47,760 folios at 40¢ per folio $19,104"—it appears that the charge per folio is excessive, more than the legal rate per folio. Furthermore, the defendants have paid a portion of the stenographer's fees, as will be more clearly shown by the attached vouchers showing such payment. At page 15475 of the record the master denied receiving a copy of the record.

"Mr. O'Brien: Well, it is in the record and you have been getting a copy of the record.

The Master: No, I have not had a copy of the record and I have not read Mr. Little's testimony."

This item would not be taxable in the State courts of the State of New York, and there is no rule of this court allowing such item to be taxed unless pursuant to an agreement between the parties in the action and no such agreement was made or entered into. Furthermore, under Equity Rule 50 the fees of a stenographer "shall be fixed by the court" and taxed ultimately as costs. In the above case the stenographer's fees have not thus far been fixed by the court in accordance with such rule.

(7) Defendants object to the item "Paid for Surety Bonds, premiums on bonds filed with Special Master, Richard Welling, in lieu of the deposit of impounded funds with him," amounting to $76,086, for the reasons (a) that there is no rule of this Court allowing any such disbursement as taxable; (b) the bonds filed with Special Master Richard Welling were not supersedeas or appeal bonds given pursuant [fol. 30] to any statute of this Court, but were allowed by this Court as a convenience to the complainant so as to permit it to withdraw the funds which the Court had directed to be impounded.

Dated, New York, May 9th, 1922.

Wilber W. Chambers, Solicitor for Defendant Charles D. Newton. John P. O'Brien, Corporation Counsel, Solicitor for Defendant Edward Swann.

[fol. 31] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ORDER RETAXING COSTS—Filed May 1, 1923

This cause came on to be further heard before me at the January, 1923, Term of this Court, upon the motion of the defendants to retax costs, and also upon a rehearing directed by the Court, and was argued by counsel, and thereupon, upon consideration thereof, it is ordered, adjudged and decreed:

1. The item of $21,164.44, covering the printing of briefs for complainant before Special Master, and before this Court, and the Supreme Court of the United States, is not a taxable item of costs and is disallowed.

2. The amount to be taxed as fees of stenographer for reporting the testimony, should be at the rate of 20¢ per folio, instead of 25¢ per folio, and the said item is further reduced from $7,756 to $6,204.80.

3. The amount of $28,094.63, being amount at the rate of one-half of one per cent. paid by the complainant for the use of Liberty Bonds borrowed and deposited with the Special Master in lieu of cash or surety bond, pursuant to the final decree of the Court herein, is hereby disallowed.

[fols. 32 & 33] 4. The exceptions of the defendants to the allowance of $76,086 for premiums on bonds filed with Special Master Richard Welling in lieu of the deposit of impounded funds with him are hereby overruled.

5. The defendants shall receive credit for the sum of $113.37, the costs of the appeal from the order fixing the Master's allowance as provided in the mandate of the United States Supreme Court.

6. The said Bill of costs is returned to the Clerk of this Court with directions to retax the same in accordance with the provisions of this Order, and to insert the amount thereof, as retaxed together with the Clerk's fees in the judgment herein and to issue execution therefor to the complainant, as provided in the previous decree of this Court.

New York, April 30th, 1923.

Learned Hand, United States District Judge.

[File endorsement omitted.]

[fol. 34] District Court of the United States, Southern District of New York

[Title omitted]

Assignment of Errors—Filed July 30, 1923

Now come the defendants Charles D. Newton, as Attorney-General of the State of New York, and Edward Swann, District Attorney of the County of New York, State of New York, in the above entitled cause, and file the following assignment of errors upon which they will rely upon their prosecution of the appeal in the above entitled cause from the decree made by this Honorable Court on the 30th day of April, 1923, and the judgment entered thereon on the 27th day of July, 1923.

1. The Court erred in allowing the item of $76,086.00 paid as premiums on Surety Bonds filed with the Court to protect the consumers during the pendency of the action, for the reason that there is no equity rule which allows such a disbursement to be taxed against [fol. 35] the defendants, and it was an abuse of discretion on the part of the District Court in allowing the said sum.

2. That the condition of filing a Surety bond in lieu of cash was for the benefit of the complainant since it allowed it to use the excess moneys collected, prior to the final decree.

Dated, July 27, 1923.

George P. Nicholson, Corporation Counsel, Solicitor for Defendant Edward Swann, Office & Post Office Address Municipal Building, New York City. Wilber W. Chambers, Solicitor for Defendant Charles D. Newton, Capitol, Albany, N. Y.

[fol. 36] DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

PETITION FOR AND ORDER ALLOWING APPEAL—Filed July 30, 1923

The petition of Charles D. Newton as Attorney-General of the State of New York and Edward Swann as District Attorney of the County of New York shows to this Court:

First. That Charles D. Newton is Attorney-General of the State of New York and Edward Swann is District Attorney of the County of New York, and defendants in this action.

Second. That this is a suit in equity to have declared unconstitutional Chapter 125 of the laws of 1906 of the State of New York, on the ground that the rate fixed by that act for gas sold to private consumers in The City of New York was confiscatory. The defendants filed their answers denying the material allegations of the bill of complaint.

[fol. 37] Third. The case was tried before a Special Master whose report was filed on the 6th day of May, 1920. Thereafter, the defendants filed exceptions to the Special Master's report which came on for hearing before the District Court. The opinion and decree of the District Court were filed on the 4th and 11th days of August, 1920. An appeal was thereafter taken to the Supreme Court of the United States which affirmed the decrees on March 6, 1922.

Fourth. A decree and order was entered in the above entitled cause of April 30th, 1923, wherein it was adjudged and decreed in part as follows:

"4. The exceptions of the defendants to the allowance of $76,086 for premiums on bonds filed with Special Master Richard Welling in lieu of the deposit of impounded funds with him are hereby overruled."

and a judgment for the sum of $129,693.97 was docketed on the 27th day of July, 1923.

Fifth. The above named defendants, Charles D. Newton, as Attorney-General of the State of New York, and Edward Swann as District Attorney of the County of New York, feeling aggrieved by the said decree entered in the above entitled cause on the 30th day of April, 1923 and the judgment entered thereon on the 27th day of July, 1923, do hereby appeal from said decree to the Supreme Court of United States for the reasons set forth in the assignment of errors herewith filed, and pray that their appeal be allowed and citation be issued as provided by law, and that a transcript of the record of the proceedings and documents upon which said decrees are based, duly authenticated, be sent to the Supreme Court of the United

[fol. 38] States, under the rules and regulations of such Court made and provided, and your petitioners pray that an order be made dispensing with security.

Dated, New York, July 27, 1923.

Wilber W. Chambers, Solicitor for Defendant Charles D. Newton, Attorney-General of the State of New York. George P. Nicholson, Solicitor for Defendant Edward Swann, District Attorney of New York County.

Appeal allowed and bond to cover costs of appeal is dispensed with. Dated, New York, July 28, 1923.

Francis A. Winslow, U. S. D. J. A. E. J.

[fols. 39 & 40] CITATION—Filed July 30, 1923; omitted in printing

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[fol. 41] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER EXTENDING TIME

Upon the annexed stipulation dated August 1st, 1923, it is Ordered and decreed that the time of the defendants within which to serve a precipe and make a return to the United States Supreme Court on appeal herein from the decree entered on the 30th day of April, 1923, and the judgment entered on the 27th day of July, 1923, be extended to and including the 25th day of September, 1923.

Francis A. Winslow, United States District Judge.

Endorsed: U. S. District Court, S. D. of N. Y., Filed Aug. 21, 1923.

[fol. 42] DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed Sept. 6, 1923

To the clerk of the above-named court:

You will please include in the transcript of the record on appeal by the defendants allowed July 28, 1923 the following papers

1. Bill of Costs with Notice of Taxation returnable before the Clerk on April 26, 1922.

2. Bill of Costs with Notice of Retaxation returnable on November 22, 1922 before Judge Learned Hand.

3. Affidavit of James A. Donnelly, verified May 8, 1922;

4. Defendants' objections to proposed Bill of Costs filed with Clerk on May 9, 1922.

5. Decree entered April 30, 1923.

[fol. 43] 6. Petition for appeal and the allowance thereof.

7. Defendants' Assignment of Errors;

8. Citation.

9. This præcipe.

Yours, etc., George P. Nicholson, Corporation Counsel, Solicitor for Defendant Edward Swann, Office and Post Office Address Municipal Building, New York City. Wilber W. Chambers, Solicitor for Defendant Charles D. Newton, Capitol, Albany, N. Y.

Service admitted.

[File endorsement omitted.]

[fol. 44] UNITED STATES OF AMERICA,
Southern District of New York, ss:

[Title omitted]

CLERK'S CERTIFICATE

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby Certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York this twentieth day of September, in the year of our Lord one thousand nine hundred and twenty-three and of the independence of the said United States the one hundred and forty-eighth.

Alex. Gilchrist, Jr., Clerk. [Seal of the District Court of the United States, Southern District of N. Y.]

[fol. 45] DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

STIPULATION AND ADDITION TO RECORD—Filed Nov. 6, 1923

It it hereby stipulated, consented and agreed that the following papers in the above entitled action, to wit:

(a) Judgment and Decree and Opinion of Judge Learned Hand dated August 11, 1920.

(b) Opinion of Judge Learned Hand, dated March 28, 1923.

(c) Judgment entered July 27, 1923.

(d) This stipulation,

be added to and made a part of the record on appeal to the United States Supreme Court in the appeal taken by the defendants Charles D. Newton, as Attorney-General and Edward Swann, as District Attorney from the decree and judgment entered herein on the 30th day of April, 1923 and the 27th day of July, 1923, respectively, and it is further

Stipulated, consented and agreed that the copies of the foregoing papers hereto attached and made a part of this stipulation are true and correct copies of the originals of said papers on file in the [fol. 46] office of the Clerk of this Court in the above-entitled action.

Dated, New York, October 24, 1923.

Shearman & Sterling, Solicitors for Complainant. Wilber W. Chambers, Solicitors for Defendant Charles D. Newton. George P. Nicholson, Solicitor for Defendant Edward Swann.

[fol. 47] "A."

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

SUPPLEMENTAL OPINION ON MOTION TO MODIFY THE DECREE AND STAY

LEARNED HAND, D. J.: The plaintiff now moves to modify the decree of August 4, 1920, in three particulars: first, the provision for depositing the excess over eighty cents impounded; second, the "retroactive" effect of the new rate when fixed, third, the absence of findings. It also moves to amend the stay by a provision seeking to expedite the appeal.

Provisions for Deposit of Moneys Impounded

The plaintiff urges with force, I think, that to impound all the moneys over eighty cents for a period perhaps of a year will cause loss both to itself and to the consumers. It suggests that it have the [fol. 48] right to substitute adequate securities. The best that the special master can get on the deposits is probably three and a quarter per cent; the plaintiff if required to finance its temporary requirements must pay much more, it says fourteen per cent. In any case it will sustain a loss which will profit no one but the banks, so far as appears. I see no advantage in insisting upon impounding the

moneys if adequate security can be otherwise provided. I shall therefore modify the decree by allowing the plaintiff to deposit with the master in lieu of cash Liberty Bonds taken at their market value, or any other bonds which are a proper investment by savings banks in New York. These may be deposited with the special master originally or money already deposited may be drawn out from the banks upon substituting such bonds. The special master will be charged with the duty of calling upon the plaintiff for more bonds whenever their value equals that of the cash for which they are a substitute. In order to avoid repeated calls for such security I have therefore provided that the plaintiff shall in each case originally deposit one hundred and three per cent of the cash and that when their market value is equal to the cash he shall call upon the plaintiff to deposit additional bonds up to one hundred and three per cent of that cash. The interest upon these bonds accruing during the period of his possession shall be a part of the fund.

Also I allow the plaintiff to substitute surety company bonds for cash or to withdraw cash by giving such bonds, on the following conditions: No single company shall give a larger bond than $500,000 or more than one bond. The bond must secure not only the cash for [fol. 49] which it is substituted but interest at seven per cent during the period of its existence, which is to be part of the funds. The plaintiff must be a party to all such bonds and the surety company one of those recognized by the rules of this court. Provision must be made for the possibility of delays and extensions of time. I have required a substantial rate of interest because the plaintiff will be in effect using the consumers' money. On the one hand the consumer profits by getting more than he could from the banks, on the other the plaintiff profits by being relieved from high rates of interest. The rate at which the plaintiff has sold its bonds is seven per cent and on short financing the rates are much higher. I think that seven per cent should be the rate, even though the plaintiff must pay a premium to get the bond; it will recover back all that the consumers are not eventually entitled to. In result, if I take the plaintiff at its word, the opportunity will remain favorable to its acceptance. Such bonds ought not to exceed two-thirds of the total payments required.

The Conditions Imposed upon the Injunction

The second point urged is that I have exceeded my jurisdiction by imposing as a condition upon the continuance of the injunction that the fund deposited as security shall be distributed retroactively in accordance with the new rate when promulgated. The argument is that by so doing I have in effect assumed the power of the New York Legislature and during this period have substituted a rate of my own making where no rate existed. Of course if I were to try to impose [fol. 50] any such rate by any sanction other than the inducement offered by the injunction, this would be clearly true; it is equally clear that the only sanction is the injunction. If the plaintiff were absolutely entitled to an injunction as soon as the rate became confiscatory, it would also be true that the conditions I impose are un-

lawful. The plaintiff is not, however, absolutely entitled to an injunction, it is an equitable remedy and may be refused except on equitable conditions (Waldon v. Bolley, 14 Pet. 156, 164); the rule is of course most ancient and of the widest application. It has in effect been imposed in very similar circumstances (State R. R. Tax cases, 92 U. S. 575; Cummings v. Natl. Bank, 101 U. S. 163; People's National Bank v. Marye, 191 U. S. 272, 282-288). Norwood v. Baker, 177 U. S. 269, 291-294, special assessment case, is perhaps to the contrary in effect, but only because the authorities were free to make the proper assessment. It is analogous to the situation here if the Public Service Commission had now jurisdiction to make a rate. In the other cases the taxpayer who assailed the validity of the rate was obliged to pay the proper amount of the tax, in advance, as a condition of relief. In one sense these cases go further than the decree already entered herein, since they involve an assessment and levy by the court itself. In another perhaps they do not go so far, because there is now no law applicable to the plaintiff.

If the plaintiff is right I cannot limit the rate charged in any way. Once the statute is in abeyance its rights are unregulated altogether. This is contrary to the practice, at least in this District, of fixing a [fol. 51] rate pendente lite. The court must have as little jurisdiction to assume legislative prerogatives on application for temporary injunction, as on final decree. If the plaintiff's argument is good at all, it requires me to free it from all limitation as soon as the statute is found confiscatory. That argument proves too much.

There is no doubt that viewed as power alone, I might absolutely fix a rate as a condition of granting any injunction, and it makes no difference whether that rate lasted six months or six years. Any other and lower rate fixed by the State would of course in effect supersede it, but the condition of the injunction would continue to be legal. If the plaintiff chose to disregard it, it would suffer nothing but the loss of the *un*junction. It would then have to deal with the State authorities. That rate would be as good if fixed in a final decree as if fixed pendente lite or pending an appeal. But the question of power is one, recognize that the condition I have imposed is new, but it seems to me the minimal interference with the functions of the State as the rate-making body. The jurisdiction to suspend rates is at best somewhat invidious, and should be limited so far as possible to constitutional requirements as they now exist. Generally there is in existence a body which can at once assume jurisdiction; that will in such cases serve, but here it will not. Given this circumstance no better way occurs to me to limit the interference of this court with the action of the lawful authorities.

The plaintiff, however, appeals a little in misericordia; it says that having suffered several lean years it should be allowed a short period of milk and honey. The presupposition is that the rate when fixed [fol. 52] will be inadequate. Perhaps so, but it is scarcely an argument to which as a judge, and especially a Federal judge, I ought to listen. Within the limits which the Supreme Court has laid down I suppose the Legislature of New York may grant rates which will give questionable inducement to public service companies.

They have the power, and if its exercise prove impolitic, judges have nothing to say. The new rate when established must be enough under the rules or it will be again invalid; short of that it will stand. One may say, if one likes that form of statement, that it must be presumed adequate till the contrary appears.

I decline to change this feature of the decree.

Incorporation of Findings in the Decree

I have already considered this question, but the plaintiff is very insistent that some disposition should be made of the exceptions. In Oliver v. Platt, 3 How. 333, the decree did not dispose of the exceptions and Justice Story ignored the defect. In Kelsey v. Hobby, 16 Pet. 269, 276, the court held that where the matter was not of an exact sum due and all the evidence was in the record, it was not improper to confirm the report as a whole. A distinction should be drawn between the case at bar and one like Kimberly v. Arms (129 U. S. 512, 523-525), where the reference was of all the issues on consent and to hear and determine, when the findings are well-nigh conclusive. In the case at bar the reference was not on consent—though without objection—and it was only advisory in [fol. 53] any case.* In such cases "the report has no legal sanction and no further weight than such as attaches to it by reason of the fact that it may embody the researches and conclusions of an intelligent master" (Street Fed. Eq. Prac., §1516). It is, therefore, really of no consequence to dispose of the exceptions for these reasons and quite independently of the fact that this is a rate-case.

However, the point is doubtful and rather than leave it open to any difficulty on appeal I have in the amended decree confirmed specifically all these findings which I mean to confirm, and have declared that the other parts of the report are to be deemed superseded by my opinion. This can leave no doubt whatever as to what parts of the report I mean to stand. Unless I were to make findings in the declaratory part of the decree, which is never necessary (Street Op. Cit., §1964), I could not do more than refer to the opinion, which I have done.

I would not be understood to disagree with the master in so far as I have not confirmed his report. Our difference resulted from the fact that I bore much more heavily than he against the plaintiff. This might not have been a feasible disposition of the case, had the result been more doubtful. I have generally, though not always, felt justified in making conclusions not based upon the actual facts, but upon the least allowance which could fairly be taken for the various items. Obviously a difference between my re-

*The order read that the special master was "to take all of the testimony and evidence respecting the issues herein, make all needed computations and fully find the facts; but nothing herein contained shall be construed as meaning that the special master's findings of fact shall be final, but only that he shall find the facts for the purpose of aiding the court and making his recommendations."

[fol. 54] sults and the master's does not indicate that I should not agree with him, but only that I followed a different plan in dealing with the case. As it is always proper for the court to make its own findings (Henderson's Chancery Practice, 487), it becomes unnecessary to do more. As now drawn I think the decree is certainly open to no procedural challenge.

Stay Pending Appeal

I have introduced the provision suggested by the plaintiff in the stay. Perhaps it is not important, but it may help expedite the appeal.

I file herewith an amended decree and an amended stay.

August 11th, 1920.

Learned Hand, D. J.

[fol. 55] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AMENDED DECREE

This cause came on to be further heard at the August, 1920, Term of this court and was argued by counsel; and thereupon, upon consideration thereof, it is

Ordered, adjudged and d-creed that the decree of this court hitherto entered herein on the fourth day of August, 1920, be and the same hereby is amended so as to read as follows:

[fol. 56] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

This cause came on to be further heard at the July, 1920, Term of this court and was argued by counsel and thereupon, upon consideration thereof, it is

(1) Ordered, adjudged and decreed that the exceptions to the following numbered findings of the special master in his report proper filed herein May 6, 1920, are overruled:

One, two, three, four, five, modified by adding after the words "constituent companies," the words, "excepting certain expired rights to open streets for new mains," six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, eighteen substituting for the phrase, "have been kept in conformity with said rules and regulations" the phrase, "have been kept in substantian conformity with said rules and regulations," nineteen, twenty. [fol. 57] twenty-one, twenty-two twenty-five, twenty-six, twenty-eight, twen-y-nine, thirty-three, forty, forty-one, forty-three, forty-

five, forty-six, forty-eight, fifty, fifty-two, fifty-three substituting for the phrase, "have included in lieu thereof one-half of the additional investment required for the new water-gas unit," the phrase, "have included in lieu thereof and of the Fourteenth and Forty-second Street plants the whole of the additional investment required for the new water-gas unit," sixty-two modified by striking out the words, "showing a net profit with complainant company as of September, 1919, of not more than 4.73 per thousand cubic feet of gas sold," sixty-six, sixty-seven, sixty-eight, seventy-one, seventy-five, seventy-seven. And it is

(2) Further ordered, adjudged and decreed that the other exceptions to the report of said master and to his opinion as incorporated in his report are sustained, and that there are substituted therefor as findings of fact and law the findings set forth in the opinion of Learned Hand, D. J., filed herein on August fourth, 1920. And it is

(3) Further ordered, adjudged and decreed that Chapter 125 of the Laws of 1906 of the State of New York in so far as it prohibits the plaintiff herein from charging or receiving more than eighty cents per thousand cubic feet for the sale of gas in the Borough of Manhattan has been since January first, 1918, and now is confiscatory, and that said law deprives the plaintiff of its property without due process of law contrary to the Fourteenth Amendment to the Constitution of the United States. And it is

[fol. 58] (4) Further ordered, adjudged and decreed that the said law since January first, 1918, has been and now is invalid, as violative of said Amendment, that the plaintiff has no adequate remedy at law for any injury resulting from the enforcement of said law except by injunction, and that it is entitled to the relief hereinafter prescribed. And it is

(5) Further ordered, adjudged and decreed that the defendants, Charles D. Newton, as Attorney General of the State of New York, Edward Swann, as District Attorney of the County of New York, and Lewis Nixon, constituting the Public Service Commission of the State of New York for the First District, their successors, agents, servants and employees, be, and each of them hereby is, restrained for a period of five years from the date of the entry of this decree from suing for any penalty or forfeiture described in Chapter 125 of the Laws of 1906, or from in any other way enforcing, or attempting to enforce, the said Act, or from taking any action under the Public Service Commission Law to enforce said Act; and it is

(6) Further ordered, adjudged and decreed, as a condition of the continuance of the injunction hereinbefore granted, that until March first, 1921, or until the earlier promulgation of a gas-rate applicable to the plaintiff by some competent authority of the State of New York, the plaintiff shall neither charge nor collect for the sale of gas in the City of New York more than the sum of One dollar and twenty cents per thousand cubic feet. And it is

(7) Further ordered, adjudged and decreed as a further condi-[fol. 59] tion upon the continuance of said injunction that until March first, 1921, or until the earlier promulgation of such gas rate by such authority the plaintiff shall on the fifteenth day of August, 1920, and on the fifteenth day of each succeeding month, pay to Richard Welling, Esq. (who is hereby appointed special master for that purpose), out of all moneys collected by it for sale of gas in the City of New York all sums in excess of eighty cents. And it is

(8) Further ordered, adjudged and decreed that the said special master shall deposit all moneys so paid to him, equally in accounts in his name as special master in the New York Trust Company, the United States Mortgage & Trust Company, and the Title Guarantee & Trust Company at such interest as he can best obtain, to be withdrawn therefrom only upon order of this court. And it is

(9) Further ordered, adjudged and decreed that the said special master shall hold said moneys until March first, 1921, or until the earlier promulgation of such rate, as aforesaid, and upon the earlier promulgation of such rate the said special master shall on order distribute the moneys so collected with accrued interest, in accordance with such rate as though the same had been in effect from the date of the entry of this decree; but if no such rate shall have been promulgated on or before March first, 1921, then he shall pay over the sums so collected with accrued interest to the plaintiff. The said special master in either case to retain therefrom his expenses and allowances when fixed by the court. And it is

(10) Further ordered, adjudged and decreed that instead of making any payment or part payment to said special master in cash here-[fol. 60] inbefore required, the plaintiff may at its option deposit with said special master Liberty Bonds of the United States or any other bonds in which savings banks are authorized to invest under the laws of the State of New York of a market value at the time of such deposit equal to one hundred and three per cent of the payment or part payment for which they are substituted; said bonds to be held by said special master subject to the provisions in this decree marked (9), both as to their principal and any interest accruing thereon during the period of his possession, said interest to be apportioned per diem. And whenever the market value (less subsequently accrued interest) of such bonds shall be no more than the cash for which they are a substitute, the said special master is hereby directed to call upon the plaintiff to deposit with him additional bonds sufficient to make up one hundred and three per cent of such cash, and such deposit shall be a condition upon the further continuance of this injunction. And it is

(11) Further ordered, adjudged and decreed that the plaintiff may at any time withdraw on order any cash previously paid to the special master upon the deposit with said special master of such bonds to be held by him under the same terms as are applicable to the deposit of bonds in place of any original payment. And it is

(12) Further ordered, adjudged and decreed that instead of making any payment or part payment to said special master in cash hereinbefore required, the plaintff may, at its option, file in court on order a surety bond in place of the same upon the following [fol. 61] terms and conditions: All such bonds shall be executed by the plaintiff and by a surety company authorized to give bonds by the rules of this court. No surety company shall execute more than one bond and that in a sum no greater than $500,000. All bonds shall be conditioned in the payment of the sum in cash for which they are a substitute together with seven per cent thereon until the time of payment. All such bonds shall be further conditioned upon the payment of the principal and interest thereof in accordance with the provisions of this decree marked (9) or of any future modification thereof, and shall contain a provision that the same shall continue*d* valid notwithstanding any future extension by decree of the period hereinbefore mentioned within which a new rate may be promulgated, and notwithstanding any further extension of payment resulting from any stay during the pendency of any appeal herein, and an- other modification of this decree or of any stay in particular. Such bonds in the aggregate shall not at any time exceed two-thirds of the total payments then required by the terms of this decree. And it is

(13) Further ordered, adjudged and decreed that the plaintiff may on order at any time withdraw any moneys previously paid to the said special master upon filing any surety bond drawn as hereinbefore described. And it is

(14) Further ordered, adjudged and decreed that the foregoing provisions of this decree marked (9), (10), (11), (12), and (13) shall apply to all moneys collected by the plaintiff between July 1, [fol. 62] 1920, and August 5, 1920, under the temporary injunction heretofore issued herein by the statutory court on June 28, 1920. And it is

(15) Further ordered, adjudged and decreed that at any time while the injunction hereinbefore granted shall remain in force, any party hereto, including the successor in office of any of the defendants, may apply upon notice at the foot hereof to vacate, modify, or extend the foregoing injunction because of any change of circumstances since the entry hereof; or for any additional relief to which he or it may become entitled. And it is

(16) Further ordered, adjudged and decreed that the plaintiff do recover its costs and disbursements when duly taxed of the defendants to be borne equally upon them, and that the allowance and expenses of Abraham S. Gilbert, Esq., the special master appointed to hear and report herein, shall be fixed by the court upon motion made by any party hereto, or by the said special master, and shall be paid by the defendants equally, or upon their default, then out of the cash, bonds, or surety bonds hereinbefore described.

August 4, 1920.

Learned Hand, U. S. D. J.

Learned Hand, U. S. D. J.

August 11th, 1920.

[fol. 63] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AMENDED STAY

This cause came on to be further heard at the August, 1920, Term of this court, and was argued by counsel, and thereupon, upon consideration thereof, it is

Ordered, adjudged and decreed that the stay herein entered on the fourth day of August, 1920, be and the same hereby is amended so as to read as follows:

[fol. 64] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

This cause came on to be further heard at the July, 1920, Term of this court and was argued by counsel and thereupon, upon consideration thereof, it is

Ordered, adjudged and decreed that in case the defendants or any one of them shall within thirty days after the entry of final decree herein appeal therefrom to the Supreme Court of the United States, then and in that case the conditions imposed upon the continuance of the injunction in said decree shall continue until the determination of such appeal and the special master appointed in said decree shall not distribute the moneys or bonds collected by him until such determination, and the surety bonds if any given shall continue in effect until the same time, notwithstanding any extension of time given to prosecute said appeal.

[fol. 65] And it is

Further ordered, adjudged and decreed that all moneys collected by, or bonds deposited with, said special master and the proceeds of any surety bonds filed herein, in accordance with such decree shall at all times be held subject to the order of this court upon mandate of the Supreme Court of the United States. And it is

Further ordered, adjudged and decreed that this order is made, and shall continue in effect only upon the condition that the defendants, and each of them, shall perfect and prosecute any such appeal, and print and file the record and all necessary papers to that end, promptly and without delay; and in the event that the plaintiff is at any time of the opinion that the perfecting of such appeal, the filing of the record, briefs, or other papers, or the bringing on of the appeal for argument, is being unreasonably and unnecessarily delayed by the defendants or any of them, it may apply to this court, upon notice, for such a modification of this order or other action as may be warranted in the premises.

August 4, 1920.

Learned Hand, U. S. D. J. Learned Hand, U. S. D. J. August 11th, 1920.

[fol. 66] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

OPINION ON MOTION TO ALLOW CERTAIN CLAIMS

This is a motion to allow certain claims in the plaintiff's bill of costs in a suit in equity. The plaintiff filed a bill in equity to restrain the public officials of the State and County of New York from enforcing a statute limiting the price of gas in the City of New York. The plaintiff won but pending an appeal the decree of injunction was made conditional on the plaintiff's depositing all sums collected in excess of the statutory rate with a special master. The plaintiff later got leave to substitute surety bonds instead of cash, and later still, Liberty bonds. The appeal being decided in the plaintiff's favor, it taxed the premiums on the surety bonds, as part of its bill of costs and these were allowed. The Liberty bonds deposited it procured in part from its own treasury and in part from the treasuries of allied companies, all, or substantially all, of whose shares it owned. There was a profitable use for these bonds, as appears in the opinion, and the plaintiff paid its allied companies one-half of one per cent a year for the bonds which it borrowed for them, that being the value of the use to which they could put them. This item and the loss of its own profit on those of its own bonds which it used, it did not include in its original bill of costs, and now seeks to have inserted by motion.

[fol. 67] Jacob H. Goetz for the motion.
Harry Hertzoff opposed.

LEARNED HAND, D. J.: Before the amended admiralty rules fixed the practise, it had been the custom in this Circuit to allow as costs premiums on stipulations given to release vessels from arrest, The Voland, 181 Fed. R. 643 (C. C. A. S.). The Hursidale, 171 Fed. R. 607, The John D. Dailey, 168 Fed. R. 642. Elsewhere the authorities were not unanimous, but in such matters we follow our local custom. I have been unable to get much help out of the books as to the rule in suits in equity. Judge Lacombe in Edison v. American Mut. Co., 117 Fed. R. 192, allowed premiums paid on a supersedeas bond, in what I take to have been a suit in equity, but that is the only case in this Circuit which I can find. It has, however, been our uniform custom to allow such items in all sides of this court for the fourteen years that I have sat here, and no distinction has ever been drawn between law, equity or admiralty. I think that the decisions on the admiralty side before the rule are competent authority if anything more than custom be necessary. Therefore I shall let the taxation stand as respects the premiums paid on surety bonds.

The other claim of the plaintiff is not the same. After depositing with the master surety bonds in large amounts the plaintiff thought that it should be allowed to substitute Liberty bonds, and did so,

after I had approved. It now claims the amounts which it paid to its allied companies which lent these bonds, and equal sums for those of its own bonds which it deposited. In support of these claims it alleges that there was a financial value to the use of these bonds, which it was the custom to lend to the National City Bank at one-half of one per cent per annum. Thus, considering for a moment the plaintiff's own bonds, it was deprived of a profit which it would otherwise have [fol. 68] got while they remained out on loan.

The logic of this is sound enough; the plaintiff is the poorer by what it has lost. But in such matters logic counts for little and custom much. No one has, so far as I know, ever suggested before that losses of profits involved in the incidents of a law-suit are properly taxable as costs. In this country there has never been any effort to make whole the winning party for his outlay in a suit. What is allowed is fixed by convention or by express law or rule. Whether it should be so is another matter, not for me to determine. I am altogether confident that this claim is quite beyond any allowance ever made or the principle of any such allowance.

The amounts actually paid for the use of Liberty bonds of the plaintiff's allied companies fall within the same reasoning. If the plaintiff had paid onehalf of one per cent. to a genuinely independent company, more might be said, though that would be an extension of any custom heretofore prevailing. That question, however, I pass, because in my judgment it does not arise. The plaintiff was the owner of all the stock of the allied lending companies, with such trivial exceptions as need not be considered. The sums which it paid to them enriched its own holdings in those shares by exactly their amount, and in substance the situation is precisely the same as though it had used its own bonds and lost the corresponding profit. Of course I know that for many purposes these corporations are independent, that third persons deal with them as separate entities which they are. But here we have a case in which to allow the recovery is to give with one hand what I have taken away with the other; to allow the shares held by the plaintiff to be enriched, when I have declined to enrich its treasury directly. To do that appears to me to contradict the theory on which I deny the sum to the [fol. 69] plaintiff.

Therefore, I decline to retax these disbursements, ignoring the question whether the failure of the plaintiff originally to include them in its bill of costs concludes it. The motion is denied.

The retaxation in the case of the subsidiary companies will similarly excise any payments made to the Consolidated.

L. H., D. J. March 28, 1923.

[fol. 70] DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF NEW YORK.

[Title omitted]

JUDGMENT

The complainant in the above entitled cause filed its bill of complaint on the 16th day of January, 1919 and the writ of subpœna was thereupon issued and returned personally served.

Appearances were duly extended for the defendants as follows: For Travis H. Whitney, Charles S. Hervey and Frederick J. H. Kracke, constituting the Public Service Commission of the State of New York, First District, by Godfrey Goldmark; for Charles D. Newton as Attorney General of the State of New York by Wilber W. Chambers, Deputy Attorney General; for Edward Swann as District Attorney of the County of New York, State of New York by Robert C. Taylor.

[fol. 71] On May 16, 1919 an order was filed substituting William P. Burr, Corporation Counsel of the City of New York as solicitor for the defendant Edward Swann, District Attorney of the County of New York in place of Robert C. Taylor and on June 10, 1919 motion of plaintiff to set aside said order was denied.

On May 13, 1919 an order was filed substituting Lewis Nixon constituting the Public Service Commission of the State of New York, First District as party defendant in place of defendants Travis H. Whitney, Charles S. Hervey and Frederick J. H. Kracke constituting the Public Service Commission of the State of New York, First District.

On March 3, 1919 an order was filed denying petition of the City of New York for leave to intervene as a party defendant and on May 28, 1919 an order was filed denying motion by the City of New York to resettle said order of March 3, 1919. On May 29, 1919 an appeal was taken from said orders to the United States Circuit Court of Appeals for the Second Circuit and the transcript of record on said appeals was on June 7, 1919 certified to said Court.

On July 18, 1919 the mandate of the Circuit Court of Appeals was filed upon which on July 29, 1919 the decree of this Court was filed and entered affirming the order filed March 3, 1919 and adjudging that the complainant recover of the City of New York the sum of $25.25 costs of said Circuit Court of Appeals. On September 2, 1919 an order was filed denying motion by the City of New York to stay proceeding pending the determination of the Supreme Court of the United States upon an application for a writ of Certiorari to review said mandate.

[fol. 72] On February 8 and 17 and May 24, 1919 thereafter answers to the bill of complaint were filed the same being hereunto annexed.

On May 15, 1919 an order was filed denying motion of the defendant the District Attorney of the County of New York to dismiss the complaint.

On May 16, 1919 an order was filed appointing Abraham S. Gilbert, Esq. as special master to take testimony and evidence, make needed computation and find the facts and make report to this Court, said special master on June 20, 1919 filed his oath of office. On May 6, 1920 filed his report and on June 4, 1920 filed his certificate as to allowance.

Exceptions to said special master's report were filed by the defendants on May 25, 1920.

On June 29, 1920 a decree of said Court was filed and entered in favor of the plaintiff granting a temporary injunction restraining the defendants upon the conditions among others (a) that complainant beginning July 1, 1920 and during the pendency of the injunction shall furnish gas to consumers at a price not exceeding one dollar per 1,000 cubic feet; (b) that complainant shall pay the difference between 80 cents and the price collected by it per 1,000 cubic feet to Richard A. Welling, Esq., who is appointed Special Master for the purpose of depositing same in the depositories designated and applying same in accordance with the final decree.

On July 27, 1920 defendants appealed to the Supreme Court of the United States from said decree, but no transcript of record on appeal was certified.

[fol. 73] On August 4th and 11th, 1920 the decree and amended decree of this Court were filed and entered in favor of the plaintiff, ruling on the exceptions to the special master's report and modifying said report and adjudging that Chapter 125 of the Laws of 1906 of the State of New York is invalid in certain respects and enjoining defendants for a period of five years or until determination of any appeal from this decree upon certain conditions and impounding with Richard A. Welling, Esq., special master, certain excess sums collected by plaintiff or securities or surety bonds in lieu of such sums and adjudging that any of the parties hereto may at any time apply to said Court for an order vacating or modifying the terms of the decree and that plaintiff recover costs and disbursements when taxed, of the defendants to be borne equally by them. An appeal was taken from said decrees on September 9, 1920 by defendants and on November 10, 1920 by complainant and the transcript of record on said appeal was thereafter certified to the United States Supreme Court.

On February 28, 1921 a decree of this Court was filed and entered denying motion of the defendants to modify in certain respects the decree filed August 4, 1920 as amended and further amending said decree. On March 7, 1921 complainant appealed to the Supreme Court of the United States from the said decree and on March 6, 1921 the transcript of record on said appeal was certified.

On June 23, 1921 a decree of this Court was filed and entered amending the decree filed August 4, 1920 as amended, by limiting the amount of bonds which special master Richard A. Welling, Esq. may accept from any one surety company.

[fol. 74] On April 2, 1921 an order was filed awarding $6,500 to Richard A. Welling, special master, as compensation on account.

On March 15, 1922 said special master Richard A. Welling filed his report.

On December 7th and 13th, 1921 the decree and amended decree of this Court were filed and entered fixing the compensation of A. S. Gilbert as special master and adjudging that the same shall be paid in the first instance by the complainant and shall be taxed as costs to be paid equally by the defendants as provided in the final decree herein. On January 16, 1922 defendants appealed to the Supreme Court of the United States from said decrees and the transcript of record on said appeal was thereafter certified to the Supreme Court. On June 20, 1922 the mandate of the United States Supreme Court was filed reversing said decrees, costs to be paid by appellants with right to claim credit therefor upon any judgment hereafter entered against them on account of the master's compensation and that said Consolidated Gas Company of New York recover against the defendants for its costs herein expended and remanding cause to this Court for further proceedings, whereupon on June 29, 1922 the decree of this Court was filed and entered adjudging that the compensation of A. S. Gilbert as special master herein to the extent of $28,750, together with the sum of $655.38 the necessary disbursements of the master be taxed as costs in this suit to be paid equally by the defendants.

On March 15, 1922 there were filed three mandates of the Supreme Court of the United States (1) affirming the decree of this Court [fol. 75] filed February 28, 1921 with costs to the defendants, (2) modifying the decrees filed August 4th and 11th, 1920 staying defendants and as so modified affirming same with $20 costs to the complainant, (3) modifying the final and supplemental final decrees filed August 4th and 11th, 1920 and as so modified affirming same with $362.40 costs to the complainant.

On March 15, 1922 the decree of this Court upon said mandates was filed and entered (1) making the judgment of the United States Supreme Court the judgment of this Court; (2) amending he final decree of this Court filed August 11, 1920 as amended by the decree filed February 28, 1921 by making it a condition upon the Continuance of the injunction granted that plaintiff shall until determination of any appeal from said amended decrees pay to Richard A. Welling, Esq. all excess moneys collected; (3) amending said decrees by providing that the said special master shall hold all moneys collected by him until the determination by the Supreme Court of the United States of any appeal by the defendants from the final judgment therein and in case the final judgment entered therein upon the mandate of the Supreme Court of the United States sustain as to the plaintiff Gas Company the invalidity of Chapter 125 of the Laws of 1906 the said special master shall pay over the same to the plaintiff with accrued interest; (4) adjudging that the special master shall pay and deliver over to the complainant all funds, bonds or other securities, remaining in his hands or deposited with him by said complainant, pursuant to the provision of the decrees for temporary injunction filed June 28, 1920 and of the final decree filed August [fol. 76] 11, 1920; (5) adjudging that said special master Richard A. Welling, Esq. is authorized to retain as compensation the sum of $15,000 (of which $6,500 has already been paid on account) and for disbursements the sum of $2,330.06; (6) adjudging that all

surety bonds filed with the clerk of this Court by the complainant be cancelled and released and the surety thereon be discharged from any and all further liability.

On May 17, 1922 defendants appeal from said decree filed March 15, 1922 but no transcript of record on said appeal was ever certified.

And the costs having been retaxed by the Clerk in accordance with the orders annexed hereto, at the sum of One Hundred Twenty-nine Thousand, Six Hundred Ninety-three and 97/100 ($129,693.97) Dollars, the process, pleadings and decrees together with other papers filed in said cause, are duly annexed hereunto.

Wherefore let the said complainant, the Consolidated Gas Company of New York, recover of said defendants, Charles D. Newton, as Attorney General of the State of New York, Edward Swann, as District Attorney for the County of New York, State of New York, and Lewis Nixon, constituting the Public Service Commission of the State of New York, the sum of One Hundred Twenty-nine Thousand, Six Hundred Ninety-three and 97/100 ($129,693.97) Dollars, the costs and charges as taxed.

Signed and enrolled this 27th day of July A. D. 1923.

Alex. Gilchrist, Jr., Clerk.

[fols. 77] UNITED STATES OF AMERICA,
Southern District of New York, ss:

[Title omitted]

CLERK'S CERTIFICATE

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby Certify that the foregoing is a correct supplemental transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this fifth day of November, in the year of our Lord one thousand nine hundred and twenty-three and of the Independence of the said United States the one hundred and forty-eighth.

Alex. Gilchrist, Jr., Clerk. [Seal of the District Court of the United States, Southern District of N. Y.]

[fols. 78 & 79] [File endorsements omitted.]

Endorsed on cover: File No. 29,875. S. New York D. C. U. S. Term No. 565. Charles D. Newton, as attorney general of the State of New York; Edward Swann, as district attorney of the county of New York, et al., appellants, vs. Consolidated Gas Company of New York. Filed September 22d, 1923. File No. 29,875.